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NO. 97-462

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

STATE OF MARYLAND,

Petitioner

v.

MICHAEL PATRON HUGHES,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals of Maryland correctly held that a question on an arrest form asking whether the arrestee is a "narcotics or drug user" does not fall within a routine booking question exception to *Miranda v. Arizona*, 384 U.S. 436 (1966)?

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Respondent, Michael Patron Hughes, by counsel, Nancy S. Forster, Assistant Public Defender, and Julia Doyle Bernhardt, Assistant Public Defender, Office of the Public Defender for the State of Maryland, respectfully request that the Court deny the petition for writ of certiorari filed by the State of Maryland as there has been no showing that the question presented is one that merits consideration by this Court.

STATEMENT OF THE CASE

On October 14, 1993, Michael Patron Hughes, Respondent, was arrested on suspicion of involvement in the distribution of illegal drugs near Warner Avenue in Prince George's County, Maryland. The particular area under surveillance by a team of Prince George's County police officers had "been targeted for special assignment due to a large amount of drug complaints that [the department] had received from citizens. . ." (4/11/95-20). Officer Raymond Fox and Officer Michael worked as a team conducting the surveillance operation. They watched for drug activity in an apartment complex. The officers saw what they believed to be drug distributions taking place in the area under surveillance. (4/11/95-23-24). When the word was relayed that Officers Fox and Michael had "both witnessed what appeared to be hand to hand transactions between passing pedestrians," other officers in the area ran toward the "target area." (4/11/95-49).

Corporal David Morissette chased Respondent who, during the chase, discarded a small object onto the ground. (4/12/95-11). After subduing Respondent, Corporal Morissette retrieved the object which was a "small glassine lock bag" that appeared to have "cocaine rocks" in it. (4/12/95-14). Respondent was searched and $62.00 and a pager were recovered from him. The contents of the bag were analyzed and found to contain eight rocks of crack cocaine.

While booking Respondent at the police station, Corporal Morissette filled out a standard Prince George's County Police Department arrest report. In addition

to biographical information such as the arrestee's name, address, and telephone number, the form contains a question which asks if the arrestee is a "narcotic or drug user." When asked this question by Corporal Morissette, Respondent answered in the negative. (App. 1).

At trial, during Corporal Morissette's testimony, the State sought to elicit Respondent's answer to the question from the form regarding his being a narcotic or drug user in order to establish that Respondent possessed the drugs not for his personal use but, rather, for distribution purposes. The following colloquy occurred during Corporal Morissette's direct testimony:

> Q. Now, as I was asking you, you filled out an arrest report when you arrested Mr. Hughes?
>
> A. Yes, ma'am.
>
> Q. And what sort of questions or information is filled out on that arrest report?
>
> MR. GRIFFITHS [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Basis?
>
> MR. GRIFFITHS: I can't see the relevance of that. Anything in the arrest report would be hearsay.
>
> THE COURT: Overruled.
>
> A. Personal information such as home address, work address, phone number.
>
> THE COURT: Of whom?
>
> THE WITNESS: Of the defendant.
>
> BY MS. HILEMAN:
>
> Q. Is that all booking information that you get from the person that you've arrested?

A. Yes, ma'am.

Q. And as part of your booking information do you ask the person whether or not they are a narcotics user?

A. Yes, ma'am.

Q. And do you recall whether or not you asked Mr. Hughes whether or not he uses narcotics?

A. Yes, ma'am.

Q. And do you recall what his answer was?

MR. GRIFFITHS: Objection.

THE COURT: Come up to the bench.

(Counsel approached the bench and the following proceedings ensued.)

MR. GRIFFITHS: Your Honor, this would be hearsay. It would also be a statement of the defendant that would be entitled to be suppressed by the defense if it were taken that *Miranda*[1] rights were not read to the defendant prior to the taking of the statement. And we haven't been advised by the State that this statement will be used in this manner, and therefore haven't had an opportunity to move to suppress the statement.

MS. HILEMAN: Your Honor, this was a procedural booking question. It is part of the pedigree information. It is asked of every single person who is arrested, and I don't believe it's asked for any incriminatory purpose. Because it turns out to have some relevance does not mean--because the birth date turns out to have some relevance, but it is not asked in terms of trying to establish guilt or innocence with regard to a charge. It is asked of everyone.

THE COURT: Let me ask you to lay a foundation. I am going sustain it. You ask him why he asks that particular question.

MS. HILEMAN: Okay.

(Counsel returned to the trial tables and the proceedings

---

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

resumed in court.)

BY MS. HILEMAN:

Q. Corporal Morissette, this arrest report that you fill out, do you fill it out for every single person that you arrest?

A. Yes.

Q. Does it matter what they are charged with?

A. No.

Q. And the question of whether or not they are narcotics users, is that something you ask every single person that is arrested?

A. Yes, ma'am.

Q. That you arrest. I'm sorry.

A. Yes.

Q. And does it matter what the charge is?

A. No.

Q. And why — do you know why this is a question that is included in the general information on an arrest report?

MR. GRIFFITHS: Objection.

THE COURT: This requires a yes or no.

A. No, I don't.

THE COURT: Let me see the form. Do you have one that I can read?

MS. HILEMAN: Unfortunately that's the carbon.

THE WITNESS: I thought there was a xerox copy.

MS. HILEMAN: I have a copy, but I don't think it's much better than that one. And it's question No. 18 that's on that line.

THE COURT: This appears to be Prince George's county Form No. 3245, which has been in use since December of 1984. It looks like a standard booking form arrest report from the police department for an adult. And it seems to contain just basic information which is needed in order to process a criminal

case and a person accused, and I'm going to overrule the objection and allow the answer.

THE CLERK: State's Exhibit No. 4 marked for identification.

(State's Exhibit No. 4 marked for purposes of identification).

BY MS. HILEMAN:

Q. Corporal Morissette, I'm showing you what has been marked State's Exhibit No. 4, and what is that document, just for the record?

A. Prince George's County Police Department arrest report.

Q. And who filled that document out?

A. I did.

Q. And on Question No. 18, which is part of the preprinted booking information, did you ask the defendant whether or not he was a narcotics or drug user?

A. Yes.

Q. And what was his response?

A. No, he was not.

(4/12/95-24-29).

During her closing argument to the jury, the prosecutor emphasized Respondent's answer to question number 18.

MS. HILEMAN: You also have a statement that was made during the booking process by the defendant that he doesn't use drugs. Well, you may consider that however you wish. You can ignore it totally if you want to, whatever you want to do, but I think that that is — you can take that into consideration. If he says he doesn't use drugs, then he presumptively didn't have this for his own personal use, he intended to do something with it, or if you decide that because he was being booked at that time that maybe he wasn't telling the whole story, that's fine, but even without that statement, you

> certainly have a quantity of drugs with the surrounding circumstances that indicate that he in fact intended to sell it or give it away.

(4/12/95-121-122).

REASONS FOR DENYING THE WRIT

Petitioner asserts that this Court can accomplish three purposes in granting review of this case: adopting a routine booking question exception to *Miranda;* resolving confusion concerning the appropriate standard for determining whether a particular question falls within that exception; and holding that the question used by the Prince George's County Police Department in this case falls within that exception.

The first purpose has already been accomplished however. In *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), this Court, albeit by a plurality vote, adopted a "routine booking question" exception to the requirements of *Miranda.* 496 U.S. at 601.

Petitioner asserts that a second purpose may also be accomplished by granting review in this case; that is, affording this Court an opportunity to resolve confusion regarding the appropriate standard for determining whether or not a question falls within the routine booking exception. Petitioner argues that the confusion among the lower courts stems from the dichotomy in approaches recognized by this Court in two different cases: *Rhode Island v. Innis*, 446 U.S. 291 (1980) and *Pennsylvania v. Muniz, supra*. It is Petitioner's contention that this Court, in *Innis*, adopted an

objective test for determining whether a question falls within the routine booking exception. In *Innis*, this Court held that "interrogation" for purposes of applying *Miranda* is "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301. Ten years later, in *Pennsylvania v. Muniz*, this Court, in a footnote, stated that

> Recognizing a "booking exception" to *Miranda* does not mean, of course, that any question asked during the booking process falls within that exception. Without obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions, even during booking, that are designed to elicit incriminating admissions.

Id. at 602 n. 14. *Muniz* thus requires, according to Petitioner, a subjective approach to the "routine booking question" exception.

The dichotomy presented by Petitioner is a false one. Careful reading of these two cases demonstrates that they are not in conflict. *Innis* dealt solely with the question of what constitutes interrogation such that *Miranda* warnings should be given before interrogation begins. In *Innis*, this Court merely defined the scope of interrogation and did so in an objective way: "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." In *Muniz*, this Court found that questions asked of Muniz at the time of his arrest requesting biographical data such as his name, address, height, weight, eye color, date of birth, and current age, fell within the definition of interrogation as

defined in *Innis*. The Court went on the hold, however, that while the questions did constitute interrogation, the answers were "nonetheless admissible because the questions fall within a 'routine booking question' exception which exempts from *Miranda's* coverage questions to secure the 'biographical data necessary to complete booking or pretrial services.'" *Pennsylvania v. Muniz*, 496 U.S. at 601. The Court noted that it "agree[d] with *amicus* United States" in its formulation of the routine booking question exception. *Id.*

The *amicus* United States brief, cited with approval by the Court, explained that:

> Recognizing a 'booking exception' to *Miranda* does not mean, of course, that any question asked during the booking process falls within that exception. Without obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions.

Pennsylvania v. Muniz, 496 U. S. at 602, n.14. One of the cases cited with approval by this Court for the above proposition was *United States v. Mata-Abundiz*, 717 F. 2d 1277 (9th Cir. 1983). In that case, an Immigration and Naturalization Service investigator questioned the defendant while he was in jail charged with a violation of state statutes against carrying a concealed weapon and possession of a firearm by an alien. During his questioning of Mata-Abundiz, the investigator asked about his citizenship and the defendant replied that he was a citizen of Mexico. Mata-Abundiz sought, at his trial, to have this statement suppressed because it was given without the benefit of *Miranda* rights. The Ninth Circuit Court of Appeals agreed that the

statement should have been suppressed and held:

> The government contends that DeWitt's questioning falls within the exception to the *Miranda* requirements for routine background questioning attendant to arrest and booking. ...
>
> In *[United States v] Booth* [669 F. 2d 1231 (1981)] we explained this exception for routine booking procedures and noted that it arises because background questions rarely elicit an incriminating response. *...If, however, the questions are reasonably likely to elicit an incriminating response in a particular situation, the exception does not apply*....As we stated in *Booth:*
>
> > Ordinarily, the routine gathering of background, biographical data will not constitute interrogation. Yet we recognize the potential for abuse by law enforcement officers who might, under the guise of seeking "objective" or "neutral" information, deliberately elicit an incriminating statement from a suspect.
>
> . . .*The test is objective. The subjective intent of the agent is relevant but not conclusive*. . . .The relationship of the question asked to the crime suspected is highly relevant....In this case, the questioning conducted by Investigator DeWitt was reasonably likely to elicit an incriminating response . . .

717 F. 2d at 1280 (emphasis added). Thus, in *Muniz,* this Court cited the above standard as the appropriate one for determining whether or not a question falls within the routine booking exception. Obviously, this standard does not conflict with the *Innis* approach to determining whether or not a suspect has been subject to interrogation but, rather, adopts the same approach. Therefore, Petitioner is simply incorrect in stating that there exist two separate and conflicting approaches regarding whether or not a question falls within a routine booking exception.

In any event, even if one could read *Innis* and *Muniz* as adopting conflicting tests for determining whether a question falls within the routine booking exception, the question on the arrest form in the case *sub judice* would not satisfy either test.

Under the *Innis* approach, the question does not fall within the routine booking exception if the police know or should know that it is "reasonably likely to elicit an incriminating response." Here, the officer who filled out the arrest form, Corporal Morissette, was the officer who had arrested Respondent and charged him with possession with intent to distribute cocaine and possession of cocaine. Corporal Morissette plainly knew that a response to the question of whether or not Respondent was a "narcotic or drug user" would elicit an incriminating response. A negative response would inculpate Respondent because it would support the charge that he was a distributor, rather than a user, of cocaine. An affirmative response would also obviously incriminate Respondent. As the Maryland Court of Appeals pointed out, "the question was more than reasonably likely to evoke an incriminating response; it was almost certain to do so."

Under the *Muniz* approach, a question does not fall within the routine booking question exception if it it is "designed to elicit incriminating information." Petitioner argues that asking whether an arrestee is a "narcotics or drug user" satisfies the *Muniz* test because it is reasonably related to administrative concerns and thus, is not "designed" to elicit incriminating information. (Petition for Writ of Certiorari at 12-13). Petitioner posits two 'administrative' concerns: obtaining necessary medical

treatment for an arrestee who may present a potential for illness or violence as the result of drug withdrawal, and determining whether an arrestee is capable of being interrogated, *e.g.*, whether he is presently intoxicated or likely to go into withdrawal.

A general question concerning the arrestee's narcotics or drug use simply does not address these two administrative concerns. Asking if one *generally* uses narcotics or drugs will not elicit a response which will reveal a "present" potential for illness or violence as the result of drug withdrawal, nor will it reveal whether or not the arrestee is "presently" intoxicated or likely to go into withdrawal. A question which asks if the arrestee is "currently under the influence of any narcotics or drugs" would alleviate the State's administrative concerns while, at the same time, would guard against intentionally eliciting incriminatory responses. Additionally, if the concern is that an arrestee may present a potential for violence or illness because of withdrawal, the question is not comprehensive enough in that, one may become ill or violent during withdrawal from prescription medications as well; yet this question does not seem to cover prescription medications.

Moreover, a non-incriminatory question already exists on the form that would alleviate both administrative concerns cited by Petitioner. A portion of question number 18 asks for the "defendant's condition" and lists: sober, hbd[2], infl., intox., uncoop., or normal. Responses to this question would be sufficient to inform the police of whether the arrestee may be in need of medical attention or is incapable of

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[2]Counsel for Respondent has been informed by the Prince George's County Police Department that this designation refers to "has been drinking."

being interrogated due to his present condition. Clearly if Respondent had been in the throes of withdrawal, the officer filling out the form would not, as was done in this case, mark the "sober" box. There was simply nothing in the record to indicate that Respondent might have been under the influence of "narcotics or drugs" or was in need of medical attention.

Finally, Petitioner's suggestion that the question is necessary to assist the police in determining whether or not an arrestee is capable of being interrogated is illusory. The standard form used by the Prince George's County Police Department in obtaining a defendant's waiver of his *Miranda* rights prior to interrogation specifically inquires into the defendant's present physical condition by asking if he "[is] under the influence of drugs or alcohol at this time?" (App. 2).[3] Thus, the determination of whether or not an arrestee is capable of being interrogated is made at the time the *Miranda* rights are given to the arrestee.

CONCLUSION

The question in this case is plainly designed to elicit an incriminating response and any officer would know that it is likely to elicit an incriminating response. As such, no matter which approach is utilized, the question does not fall within a routine booking question exception. It follows that this case is not an appropriate one for certiorari review.

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[3]The Advice of Rights and Waiver Form contained in Appendix at page 2 is taken from an unrelated case; therefore, the name of the defendant has been deleted.

Respectfully submitted,

Stephen E. Harris
Public Defender of Maryland

Nancy S. Forster*
Assistant Public Defender

Julia Doyle Bernhardt
Assistant Public Defender

Counsel for respondent
*Counsel of Record

PRINCE GEORGE'S COUNTY
ARREST REPORT
(PRINT OR TYPE)

☒ POLICE DEPARTMENT
MDO 172100
☐ SHERIFF'S DEPARTMENT
MDO 170000
☒ ADULT ☐ JUVENILE

1a. SID # / ARREST NUMBER: 9304829
1b. CCN: 93-287-519
2. DEFENDANT'S NAME (LAST, FIRST, MIDDLE): HUGHES, MICHAEL PATRON
3. TRACKING NUMBER: 14867763 PAGE 1 OF 1
4. NICKNAME/ALIAS: MIKE / FORESKIN MAN
5a. I.D. NUMBER: 157757
5b. INCIDENT NO.
6. DEFENDANT'S ADDRESS (APT. NUMBER IF APPLICABLE): 5402 DOLE ST.
7. DATE ARRESTED: 10-14-93 TIME: 1905
CITY: CAPITOL HEIGHTS STATE: MD ZIP: 20743 PHONE #:
8. DAY OF WEEK: S M T W T F S
9. RACE: B SEX: M AGE: 21 HGT: 5'-7" WGT: 140 EYES: BRO COMPLEXION: LIGHT HAIR: BLK
10. OTHER ID CHARACTERISTICS (Glasses, Scars, Marks, Tattoos)
DRIVER'S LICENSE NUMBER: 577-04-9618 STATE: DC
11. PLACE OF BIRTH (CITY/STATE): WASHINGTON D.C.
DATE OF BIRTH: 12-25-71 S.S.N.: 577-04-8618
12. LOCATION OF ARREST/CONTACT: 4853 WARRINER AVE
13. DESCRIBE TYPE OF AREA OR PREMISES: APARTMENT COMPLEX (PROPER CORPORATE NAME OF P/A): CHERRY HILL APTS
14. EMPLOYER/SCHOOL ATTENDING (OCCUPATION/GRADE): NONE
ADDRESS OF EMPLOYER/SCHOOL: N/A CITY STATE ZIP BUS. PHONE
DEFENDANT'S RIGHT INDEX
PHOTOGRAPHED ☐ YES ☐ NO
FINGERPRINTED ☐ YES ☐ NO

16. LIST CHARGES:

TYPE:		CHARGE:	SHERIFF: WARRANT OR CASE NUMBER & COMMISSIONER / POLICE: DATE, TIME, LOCATION OF OFFENSE	INCARCERATED	REL. ON BOND	AMOUNT
FED	1	PWID	4853 WARRINER AVE LANDOVER HILLS MD 10-14-93 1905	☐	☐	
MIS	2	POSS CDS	4853 WARRINER AVE LANDOVER HILLS MD 10-14-93 1905	☐	☐	
	3			☐	☐	
	4			☐	☐	

17. POLICE: VICTIM / SHERIFF CHARGING OFFICER ON WARRANT: N/A RACE / SEX / AGE: NOTIFIED:
VICTIM'S ADDRESS or CHARGING OFFICER'S DEPT / AGENCY: HOME PHONE: BUSINESS PHONE:
DEFENDANT'S CONDITION: ☒ SOBER ☐ HBD ☐ INFL ☐ INTOX ☐ LINCOOP ☐ NORMAL
NARCOTIC OR DRUG USER ☐ YES ☒ NO TYPE: INJURIES: NONE
18. VEHICLE INFORMATION: OWNER YEAR MAKE MODEL COLOR TAG STATE
N/A
20. IF ARMED: (Describe Weapon): NOT ARMED HABITS/HABITS:
21. DEFENDANT'S BAIL STATUS AT TIME OF ARREST: OUT ON BAIL IN: ☐ D.C. ☐ P.G. ☐ OTHER NO
ON PAROLE ☐ ON PROBATION ☐ WARRANT CHECK: ☒ LOCAL ☐ OTHER CANCELLED ☐ YES ☐ NO BY:
22. ADVISED OF RIGHTS DATE / TIME: BY WHOM: NOT QUESTIONED
DID DEFENDANT MAKE A STATEMENT? ☐ YES ☐ NO ☐ ORAL ☐ WRITTEN
CURRENCY SEIZED: ☒ YES ☐ NO AMOUNT: $ 60.00
23. DEFENDANT IDENTIFIED BY: ☒ POLICE ☐ VICTIM ☐ WITNESS HOW? ☐ PHOTOS ☐ PRINTS ☐ OTHER ON SCENE
[redacted]

24. CODE: P – PARENT; S – SPOUSE; R – RELATIVE; A – ACCOMPLICE; O – OTHER (ASSOCIATES); C – COMP; W – WITNESS

		NAME	ADDRESS	CITY, STATE, ZIP	RES. PHONE
A	1	DERRICK A HALL PERRY	1964 ROCHELLE AVE	DISTRICT HGTS, MD 20746	267-8664
	2				
	3				
	4				

25. NARRATIVE: CONTINUATION OF ABOVE ITEMS (INDICATE ITEM NUMBER)

ITEM # 25

PLAIN CLOTHES OFFICERS MCGRAIL #1850 & FOREMAN #1804 OF DEPT AND CO-DEFS INVOLVED IN SEVERAL HAND TO HAND CDS TRANSACTIONS. UNIFORM UNITS WERE CALLED IN. MIDDLE DEF WEARER #1851 & P/O HAYES #1893 CHASED SUSPECTS ON FOOT TO L.E. THIS OFFICER OBSERVED THE DEFENDANT THROW SUSPECTED CDS TO THE GROUND. RECOVERED SMALL PLASTIC BAG WITH 7 SUSPECTED ROCKS OF CRACK COCAINE FIELD TESTED POSITIVE FOR [redacted] I.D. & $60.00. ALL SUSPECTS WERE ARRESTED AND TRANSPORTED TO DIST I.

26. ARRESTING DEPUTY'S / OFFICER'S PRINTED NAME / I.D.: CPL. D. MOREESETTE # 1811 SIGNATURE: PROCESSING CLERK / I.D.:
27. DEPARTMENT: ☒ COUNTY POLICE ☐ SHERIFF'S DEPT. ☐ FIRE DEPT. ☐ OTHER (SPECIFY) ASSIGNMENT: SUPERVISOR'S SIGNATURE:

BEST AVAIL

CCN

ADVICE OF RIGHTS AND WAIVER FORM

I am Officer Kenneth O'Berry
of the Prince Georges County Police Department.

Today's date is 8-2-93, and the time is 2148.

I am now going to read to you your rights under the law. If you do not understand something that I say to you, please stop me, and I will explain it to you.

TJ 1. You have the right to remain silent. If you choose to give up this right, anything that you say can be used against you in court.

TJ 2. You have the right to talk to a lawyer before you are asked any questions and to have a lawyer with you while you are being questioned.

TJ 3. If you want a lawyer, but cannot afford one, a lawyer will be provided to you at no cost.

TJ 4. If you want to answer questions now without a lawyer, you still have the right to stop answering questions at any time.

Do you understand these rights? Yes / No — TJ Initials

Do you want to make a statement at this time without a lawyer? Yes / No — TJ Initials

Have you been promised anything, have you been offered any kind of reward or benefit, or have you been threatened in any way in order to get you to make a statement? Yes / No — TJ Initials

Are you under the influence of drugs or alcohol at this time? Yes / No — TJ Initials
I Smoked PCP and Weed dont Know time

Cpl. K. O'Berry #139
Officer's Signature

Thomas Jones
Signature of Person Making Statement

8-2-93 2152
Date & Time Form Completed

8TH GRADE - Buck Lodge Middle School
READ - WRITE - YES
Education of Person Making Statement

P.C.C. Form #2628 (Revised 2/90) Previous forms obsolete

TJ

LABLE COPY